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**UNITED STATES DISTRICT COURT****SOUTHERN DISTRICT OF CALIFORNIA**TYLER BRENNEISE, *et al.*,

Plaintiffs,

vs.

SAN DIEGO UNIFIED SCHOOL  
DISTRICT,

Defendant.

\_\_\_\_\_  
SAN DIEGO UNIFIED SCHOOL  
DISTRICT,

Plaintiff,

vs.

TYLER BRENNEISE, *et al.*,

Defendants.

Case No.: 08cv28 MMA (WMc),  
(consolidated)**SECOND AMENDED COMPLAINT**(1) Appealing Portions of a  
Decision of California Office of  
Administrative Hearings;(2) For Attorneys Fees as  
Prevailing Party Under 20  
U.S.C. § 1415(i)(3);

(3) For Violation of the IDEA;

(4) For Attorneys' Fees as  
Prevailing Party in Compliance  
Complaint; and(5) For Violations of Section 504  
and the Americans with  
Disabilities Act of 1990; and,  
Request for Jury Trial

HON. MICHAEL M. ANELLO



7. ALLISON BRENNEISE and ROBERT BRENNEISE are Student's mother and father, (collectively, "Parents") and are citizens of the United States, who, at the time of the violations alleged herein, resided within San Diego, California, which is within San Diego County and the boundaries of the District.

8. SAN DIEGO UNIFIED SCHOOL DISTRICT (“SDUSD” or “District”) is a public school district organized and existing under the laws of the State of California and is located within San Diego County. At all times relevant herein, SDUSD was the local education agency responsible for providing Student with full and equal access to the public education programs and activities it offers in compliance with the requirements of state and federal law, and for providing Student, who is eligible for special education, with a “free appropriate public education” (“FAPE”) under the IDEA, the California Education Code, and Section 504, for which SDUSD receives federal financial assistance. SDUSD is a “business establishment” with the meaning of the Unruh Act.

## PROCEDURAL HISTORY

9. On or about November 29, 2006, on behalf of SDUSD, Elizabeth Estes, Esq. and Sarah Sutherland, Esq. of Miller Brown & Dannis, filed a request for due process hearing (“Due Process Hearing”) with the California Office of Administrative Hearings (“Hearing Office”).

10. On or about December 6, 2006, the Hearing Office issued a Notice of Due Process Hearing and Mediation in the matter of *San Diego Unified School District v. Tyler Brenneise*, OAH Case No. N2006120002, setting the hearing for December 29, 2006.

11. On or about December 15, 2006, SDUSD filed a Motion to Amend and Amended Due Process Request. The Hearing Office granted the motion on or about January 9, 2007.

12. On or about January 29, 2007, Student and Parents cross-filed a request for due process hearing with the Hearing Office. On that day, Student and Parents filed a motion to consolidate the newly-filed request for due process with the pending due

1 process case and a motion to vacate the due process hearing date and request a trial  
2 setting conference.

3 13. On or about January 30, 2007, the Hearing Office issued a Notice of Due  
4 Process Hearing and Mediation in the matter of *Tyler Brenneise v. San Diego Unified*  
5 *School District*, OAH Case No. N2007010848.

6 14. On or about February 2, 2007, the Hearing Office issued an Order granting  
7 Student and Parents' Motion for Consolidation.

8 15. On or about February 16, 2007, the Hearing Office issued an Order setting  
9 the Due Process Hearing in the consolidated cases for May 14-18, May 21-25 and May  
10 29-June 1, 2007, and the telephonic Prehearing Conference for April 26, 2007

11 16. The Due Process Hearing in the consolidated cases (OAH Case Nos.  
12 N2006120002/N2007010848) was held in San Diego, California before Administrative  
13 Law Judge ("ALJ") Susan Ruff on May 14-June 1, June 11-13, June 19-20, and July 11-  
14 20, 2007.

15 17. On or about October 3, 2007, the Hearing Office issued its Decision ("OAH  
16 Decision"), which was served via US Mail on October 5, 2007, and received by the  
17 Parties on October 8, 2007.

18 18. The OAH Decision identifies a total of 18 separate issues falling into four  
19 broad categories: Issues Related to Assessments; Issues Related to the August 30, 2006  
20 Proposed IEP; Issues Related to the December 4, 2006 Proposed IEP; and Issues Related  
21 to Both IEPs.

22 19. The OAH Decision held that the Student prevailed with respect to issue 10  
23 (Related to the December 4, 2006 Proposed IEP) and issues 14 and 15 (Related to Both  
24 IEPs). Specifically, the OAH Decision held that neither the August 30, 2006 Proposed  
25 IEP nor the December 4, 2006 Proposed IEP offered Student a FAPE designed to meet  
26 his unique needs because: (a) the District failed to offer to provide: (i) daily gastrostomy  
27 tube ("G-Tube") feedings, which are specialized physical health care services prescribed  
28 by a physician and required to be included in Student's IEP; and, (ii) staff qualified to

1 administer Student's G-Tube feedings, which are necessary for Student to safely attend  
2 school and access his education; and, (b) the District failed to develop and implement an  
3 appropriate transition plan to transition Student from a home school program to a school  
4 based program, and thereby denied Parents the right to participate meaningfully in the  
5 IEP process. The District prevailed as to the remaining issues.

## 6 **FACTUAL BACKGROUND**

7 20. Student suffers from late diagnosed Phenylketonuria ("PKU"), a genetic  
8 disorder. As a result of his PKU, Student requires strict monitoring of his intake of  
9 phenylalanine ("PHE"), and daily G-Tube feedings, without which he is at risk of  
10 suffering severe bodily and neurological insults.

11 21. On or about March 28, 2008, Student and his mother, along with his older  
12 brother, relocated to Minnetonka, Minnesota, where Student was enrolled in public  
13 school. Subsequently, in early Fall 2008, Student's father joined the family in  
14 Minnetonka.

15 22. On or about April 10, 2008, Student began attending Minnetonka Middle  
16 School West, a public school located in Minnetonka, Minnesota. As a result of the  
17 implementation of a Health Care Plan developed by that public school, which provides  
18 for the administration of two G-Tube feedings per day administered to Student by a  
19 school nurse, Student has been able to attend public school safely in a general education  
20 classroom.

## 21 **FIRST CLAIM FOR RELIEF**

### 22 **(APPEAL OF CERTAIN FINDINGS OF FACT**

### 23 **AND CONCLUSIONS OF LAW SET FORTH IN THE DECISION)**

24 23. Plaintiffs reallege and incorporate by reference as though fully set forth  
25 herein, paragraphs 1-23, inclusive, of this complaint.

26 24. Plaintiffs are a "party aggrieved" by the OAH Decision, as that term is used  
27 in 20 U.S.C. § 1415(i)(2)(A) and Cal. Educ. Code § 56505(k) in that the OAH Decision  
28 erred in holding in favor of the District with respect to issues 1-5 (Issues Related to

Assessments); issues 6-9 (Issues Related to the August 30, 2006 Proposed IEP); issues 11-13 (Issues Related to the December 4, 2006 Proposed IEP) ; and issues 16-18 (Issues Related to Both IEPs).

**SECOND CLAIM FOR RELIEF**  
**(AGAINST SDUSD FOR RECOVERY OF REASONABLE ATTORNEYS' FEES**  
**UNDER 20 U.S.C. § 1415(i)(3)(B))**

25. Plaintiff realleges and incorporates by reference as though fully set forth herein, paragraphs 1 - 25, inclusive of this complaint.

26. As prevailing party in the proceeding before the Hearing Office, Plaintiffs are entitled to reimbursement of the reasonable attorneys' fees incurred during the course of those proceedings under 20 U.S.C. § 1415(i)(3)(B), as well as reasonable attorneys' fees incurred in seeking those fees as part of this complaint.

**THIRD CLAIM FOR RELIEF**  
**(AGAINST SDUSD FOR RECOVERY OF REASONABLE ATTORNEYS' FEES**  
**IN CONNECTION WITH A CDE COMPLIANCE COMPLAINT)**

27. Plaintiff realleges and incorporates by reference as though fully set forth herein, paragraphs 1-27, inclusive of this complaint.

28. Student and Parents filed a request for a Compliance Complaint Investigation with the California Department of Education ("CDE") on or about July 31, 2006, alleging that Defendant had failed to implement Student's July 17, 2006 IEP related to the 2006 extended school year ("ESY IEP").

29. Following a statutorily mandated investigation, the CDE issued a Compliance Report in case No. S-0082-06/07, on November 1, 2006, detailing the results of its investigation. Subsequently, the CDE later issued two additional amended reports on November 3 and November 7, 2006.

30. The CDE's November 7, 2006 Second Amended Compliance Complaint Report found the District out of compliance with federal and state special education laws because the District had failed to implement Student's ESY IEP, and ordered the District to provide Student with compensatory education in the form of 24 hours of English Language Arts instruction and 80 minutes of Adapted Physical Education instruction.

31. On October 26, 2007, Plaintiffs' counsel sent a formal request to the District's counsel seeking payment of the attorney's fees associated with Plaintiffs' successful Compliance Complaint, pursuant to the Ninth Circuit's holding in *Lucht v. Molalla River Sch. Dist.*, 225 F. 3d 1023 (9<sup>th</sup> Cir. 2000), *aff'd P.N. v. Seattle Sch. Dist.*, 474 F. 3d 1165, 1169 (9<sup>th</sup> Cir. 2006). Defendants have refused to pay such fees.

32. Because Student was the prevailing party with respect to the Compliance Complaint, his Parents are entitled to be reimbursed for reasonable attorneys' fees incurred in connection with their Compliance Complaint.

#### **FOURTH CLAIM FOR RELIEF**

##### **(AGAINST SDUSD FOR VIOLATION OF SECTION 504 AND THE ADA)**

33. Plaintiff realleges and incorporates by reference as though fully set forth herein, paragraphs 1-33, inclusive of this complaint.

34. Student is entitled to receive the benefit of a free appropriate public education under Section 504 and 34 C.F.R. § 104.4 and § 104.33(a)(b) in the least restrictive environment.

35. The District was aware that because of his disability, Student required G-Tube feedings in order to be properly nourished while attending school and without such feedings he could not attend school without putting his health at serious risk. California law and regulations are clear and unequivocal in requiring that school districts must provide "specialized physical health care services," which include G-Tube feedings, to students who require such services.



1           36. California law and regulations are also clear and unequivocal in requiring  
2 that if a student requires specialized physical health care services during the regular  
3 school day, such services must be provided by: either (1) qualified persons who possess  
4 an appropriate credential, or (2) qualified designated school personnel trained in the  
5 administration of specialized physical health care if they perform those services under the  
6 supervision of a credentialed school nurse, public health nurse, or licensed physician and  
7 surgeon.

8           37. The District failed and refused to offer to provide either a qualified person  
9 or qualified designated trained school personnel to provide Student's G-Tube feedings.  
10 As a result of this failure and refusal, Student was not able to attend public school, in the  
11 same manner as students who are not handicapped, without putting his health and safety  
12 at risk, and Student was also not able to be educated with persons who are not  
13 handicapped to the maximum extent appropriate to meet his needs. The District thus  
14 failed to provide Student with an appropriate education that was designed to meet his  
15 individual needs as adequately as the needs of nonhandicapped persons are met, in  
16 violation of Section 504; 34 C.F.R. § 104.4, § 104.33(b)(1), and § 104.34(a); and the  
17 ADA.

18           38. By failing to comply with the clear and unequivocal requirements of state  
19 law governing the provision of G-Tube feedings to handicapped students, the District  
20 knew that it was substantially likely that Student would be harmed with respect to his  
21 federally protected right to a free appropriate public education, including the right to be  
22 educated to the maximum extent possible with persons who are not handicapped, but  
23 failed to act on that likelihood, and thus the District acted with deliberate indifference,  
24 thereby intentionally discriminating against Student in violation of Section 504.

25           39. As a result of the District's deliberate indifference and intentional  
26 discrimination, Student and his mother were forced to relocate to Minnetonka,  
27 Minnesota, to allow Student to obtain an appropriate educational program that includes  
28 the necessary G-Tube feedings administered by qualified personnel so that he could be



1 educated safely in the least restrictive environment (i.e., a general education classroom in  
2 a public school) in the same manner as nonhandicapped children.

3 40. As a result of the District's violation of Student's rights under Section 504  
4 and the ADA, Student suffered injury including, but not limited to, educational injury,  
5 hedonic injury in that Student was deprived of the opportunity to engage in school  
6 activities and the opportunity to enjoy the society of other children of his age, and  
7 emotional distress.

8 41. As a result of the District's violation of Student's rights under Section 504  
9 and the ADA, Parents suffered financial and other damages, including, but not limited to,  
10 costs that Parents were forced to incur to educate Student in his home, lost wages for the  
11 time spent educating Student in his home rather than pursuing gainful employment, lost  
12 educational opportunities for Student's mother and consequent diminution in her earning  
13 capacity, lost wages and costs incurred in connection with relocating Student and his  
14 family to Minnetonka, Minnesota, and emotional distress.

### 15 16 **FIFTH CLAIM FOR RELIEF**

#### 17 **(AGAINST SDUSD FOR VIOLATION OF SECTION 504 AND THE ADA)**

18 42. Plaintiff realleges and incorporates by reference as though fully set forth  
19 herein, paragraphs 1-42, inclusive of this complaint.

20 43. The OAH Decision determined that Student's December 4, 2006 IEP, as  
21 modified by the Orders set forth in the OAH Decision, should be implemented.

22 44. The OAH Decision modified Student's December 4, 2006 IEP to include  
23 the specialized physical healthcare services Student requires for his G-Tube feedings. In  
24 pertinent part, the OAH Decision required that Student's IEP include the following  
25 language under the heading of health nursing services at page 2 of that IEP: "G-Tube  
26 feeding will be scheduled to occur daily in the nurse's office. A school nurse will be  
27 present and will personally assist the student with the student's G-Tube feeding. The G-  
28

1 Tube feeding will occur at the time(s) and in the manner designated in a doctor's order  
2 form from Student's current physician."

3 45. The OAH Decision further modified Student's IEP transition plan in the  
4 December 4, 2006 IEP to provide that: (1) "Student's mother [be included] as a  
5 participant in each of the collaboration meetings described in the transition plan . . .;" and  
6 (2) "until Student reaches phase four of the transition plan, Student's District-funded DIS  
7 services will continue with his current NPA providers and at his current levels of service,  
8 except for the services of ACES."

9 46. On November 7, 2007, over a month after the OAH Decision was issued on  
10 October 3, 2007, the District filed a Motion for Clarification of the OAH Decision with  
11 OAH asserting that the OAH Decision was unclear with respect to the District's  
12 obligation to provide Student with Occupational Therapy ("OT") services from his then  
13 current OT provider.

14 47. On November 21, 2007, OAH denied the District's Motion for  
15 Clarification, asserting that the District's contention that the OAH Decision was unclear  
16 was not well taken and reiterating the Order that the District provide Student with OT  
17 services from his then current OT provider.

18 48. Even after OAH's Order Denying Motion for Clarification, the District  
19 failed and refused to comply with the OAH Decision, by, *inter alia*,: (1) with respect to  
20 the transition plan: (a) failing and refusing to continue to provide Student with OT  
21 services from his then current OT provider; and, (b) failing and refusing to provide  
22 Student with his then-current DIS services at his then-current levels of service; and, (2)  
23 with respect to Student's G-Tube feedings, failing and refusing to ensure the presence of  
24 a school nurse to personally assist with Student's G-Tube feedings. As a result, Student  
25 was unable to obtain the same educational benefit as nonhandicapped students, was  
26 unable to attend public school without placing his health and safety as serious risk, unlike  
27 nonhandicapped persons who are able to attend public school without putting their health  
28 and safety at similar risk, and was unable to attend public school safely and be educated

1 in the least restrictive environment (i.e. a general education classroom in a public school)  
2 in the same manner as nonhandicapped children. The District thus failed to provide  
3 Student with a free appropriate public education that was designed to meet his individual  
4 needs as adequately as the needs of nonhandicapped persons are met, in violation of  
5 Section 504, 34 C.F.R. § 104.4, § 104.33(b)(1), and § 104.34(a); and, the ADA.

6 49. The District's obligation to comply with a Hearing Office Decision is clear  
7 and unequivocal, and by failing to do so, the District knew that it was substantially likely  
8 that Student would not able to safely attend public school or be able to obtain educational  
9 benefit from his educational program. Nonetheless, the District failed to act on that  
10 likelihood. Thus, the District acted with deliberate indifference, thereby intentionally  
11 discriminating against Student.

12 50. As a result of the District's failure and refusal to comply with the OAH  
13 Decision, Student was denied the receipt of OT services and excluded from attending  
14 public school due to the District's failure to ensure that Student's physical healthcare  
15 needs were met, causing Student to suffer injury including, but not limited to, educational  
16 injury, hedonic injury in that Student was deprived of the opportunity to engage in school  
17 activities and the opportunity to enjoy the society of other children of his age, and  
18 emotional distress.

19 51. As a result of the District's violation of Student's rights under Section 504  
20 and the ADA, Parents suffered financial and other damages, including, but not limited to,  
21 costs that Parents were forced to incur to educate Student in his home, lost wages for the  
22 time spent educating Student in his home rather than pursuing gainful employment, lost  
23 educational opportunities for Student's mother and consequent diminution in her earning  
24 capacity, lost wages and costs incurred in connection with relocating Student and his  
25 family to Minnetonka, Minnesota, and emotional distress.

26  
27  
28 **SIXTH CLAIM FOR RELIEF**

**(AGAINST SDUSD FOR VIOLATION OF SECTION 504 AND THE ADA)**

52. Plaintiff realleges and incorporates by reference as though fully set forth herein, paragraphs 1-52 inclusive of this complaint.

53. California law provides that all special education students are entitled to be instructed by qualified teachers, even if they are required to stay at home for reasons of health.

54. Student was required to remain at home because the District failed and refused to accommodate his need to have qualified personnel administer his G-Tube feedings at school. During the period of time that Student was forced to remain at home, the District failed and refused to provide Student with a qualified teacher to provide him with academic instruction at home. As a result, Student's mother was forced to provide Student with academic instruction and Student did not receive instruction by a qualified teacher, unlike nonhandicapped persons who are able to attend public school and receive instruction by qualified teachers. The District thus failed to provide Student with an appropriate education that was designed to meet his individual needs as adequately as the needs of nonhandicapped persons are met, in violation of Section 504; 34 C.F.R. § 104.4 and § 104.33(b)(1); and the ADA.

55. The District's obligation to provide home instruction by a qualified teacher is clear and unequivocal, and thus the failure to do so is knowing and intentional, and the District knew that it was substantially likely that Student would be harmed with respect to his federally protected right to an appropriate education as a result of the District's failure to provide home instruction by a qualified teacher. Nonetheless, the District failed to act on that likelihood, and thus the District acted with deliberate indifference, thereby intentionally discriminating against Student in violation of Section 504 and the ADA.

56. As a result of the District's violation of Student's rights under Section 504 and the ADA, Student suffered injury including, but not limited to, educational injury, hedonic injury in that Student was deprived of the opportunity to engage in school

activities and the opportunity to enjoy the society of other children of his age, and emotional distress.

57. As a result of the District's violation of Student's rights under Section 504 and the ADA, Parents suffered financial and other damages, including, but not limited to, costs that Parents were forced to incur to educate Student in his home, lost wages for the time spent educating Student in his home rather than pursuing gainful employment, lost educational opportunities for Student's mother and consequent diminution in her earning capacity, lost wages and costs incurred in connection with relocating Student and his family to Minnetonka, Minnesota, and emotional distress.

### **SEVENTH CLAIM FOR RELIEF**

#### **(AGAINST SDUSD FOR VIOLATION OF SECTION 504 and ADA)**

58. Plaintiff realleges and incorporates by reference as though fully set forth herein, paragraphs 1-58 inclusive of this complaint.

59. Student and Student's mother aggressively advocated on behalf of Student's rights at IEP meetings and in the administrative hearing in this matter.

60. The District retaliated against this advocacy on the part of Student and his mother by failing and refusing to provide qualified personnel to provide Student's G-Tube feedings, failing and refusing to implement the OAH Decision, and failing and refusing to provide Student with a qualified teacher for his home instruction, in violation of Section 504, 34 C.F.R. § 100.7, and the ADA.

61. As a result of the District's violation of Student's rights under Section 504 and the ADA, Student suffered injury including, but not limited to, educational injury, hedonic injury in that Student was deprived of the opportunity to engage in school activities and the opportunity to enjoy the society of other children of his age, and emotional distress.

62. As a result of the District's violation of Student's rights under Section 504 and the ADA, Parents suffered financial and other damages, including, but not limited to,

costs that Parents were forced to incur to educate Student in his home, lost wages for the time spent educating Student in his home rather than pursuing gainful employment, lost educational opportunities for Student's mother and consequent diminution in her earning capacity, lost wages and costs incurred in connection with relocating Student and his family to Minnetonka, Minnesota, and emotional distress.

**PRAYER FOR RELIEF**

**WHEREFORE, Plaintiff requests judgment as follows:**

**On Plaintiffs' First Claim for Relief:**

1. Declare that in addition to being named the "prevailing party" as to issues 10, 14 and 15, Student and Parents are the "prevailing party" with respect to the issues 1-9, 11-13, and 16-18.
2. Award compensatory education to Student.
3. Order the District to reimburse Parents in the amount of Ten Thousand Three Hundred dollars (\$10,300) for costs incurred in connection with various Independent Educational Evaluations obtained by Parents.

**On Plaintiffs' Second Claim for Relief:**

4. Award reimbursement for reasonable attorneys' fees and costs incurred by Parents in connection with the proceedings before the Hearing Office in an amount as determined in the discretion of this court as authorized by 20 U.S.C. § 1415(i)(3)(B).

**On Plaintiffs' Third Claim for Relief:**

5. Award reimbursement for reasonable attorneys' fees and costs incurred by Parents in connection with the CDE Compliance Complaint.

**On Plaintiff's Fourth, Fifth and Sixth Claims for Relief:**

6. Award compensatory education to Student and money damages to Student and Parents.

**On Plaintiff's Seventh Claims for Relief:**

7. Award money damages to Student and Parents.

**On All Claims for Relief:**

8. Award reasonable attorneys' fees and costs incurred by Parents in connection with the current proceeding.

9. For such additional relief as the court determines is appropriate.

**REQUEST FOR JURY TRIAL**

10. Plaintiffs' request a jury trial with respect to their Fourth, Fifth, Sixth, and Seventh Claims for Relief.

Dated: May 8, 2009

Respectfully submitted,

*Wyner & Tiffany*

ATTORNEYS AT LAW

/S/ Marcy J. K. Tiffany  
Attorneys for Defendants



CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury, that I am over the age of 18. On May 8, 2009, I served this SECOND AMENDED COMPLAINT on the San Diego Unified School District by serving their counsel of record electronically, having verified on the court's CM/ECF website that such counsel is currently on the list to receive emails for this case, and that there are no attorneys on the manual notice list.

Dated: May 8, 2009

/S/ Marcy J.K. Tiffany